

SERVICE DATE – OCTOBER 1, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB- 6 (Sub-No. 421X)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY  
–ABANDONMENT EXEMPTION–  
IN CROW WING COUNTY, MN

Decided: September 30, 2004

By petition filed on June 14, 2004, The Burlington Northern and Santa Fe Railway Company (BNSF) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 1.60-mile line of railroad extending from milepost 0.00 to milepost 1.60 in and near Brainerd, in Crow Wing County, MN. Notice of the filing was served and published in the Federal Register on July 2, 2004 (69 FR 40471). The petition for exemption will be granted, subject to environmental and standard employee protective conditions.

BACKGROUND

BNSF has served only one customer on the line proposed for abandonment for the past several years. The customer, Ferrellgas, relocated to another rail-served location in Brainerd during 2003. Since Ferrellgas's relocation, there has been no demand for service on the line and it is no longer in operation. According to BNSF, the relocation of Ferrellgas and the proposed abandonment will allow the Minnesota Department of Transportation to remove the state highway 210 overpass on the west side of Brainerd and avoid the cost of replacing it.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without the Board's prior approval. Under 49 U.S.C. 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce

regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving BNSF of the costs of maintaining and operating a line that is no longer used [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. Ferrellgas, the only shipper that has used the line in the recent past, has moved off the line to another rail-served location and supports the abandonment. Nevertheless, to ensure that Ferrellgas is informed of the Board's action, the Board will require BNSF to serve a copy of this decision on Ferrellgas within 5 days of the service date and certify to the Board that it has done so. In light of the market power finding, the Board need not determine whether the proposed abandonment is limited in scope.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, the Board will impose the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

BNSF has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. The Board's Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment.

SEA served an environmental assessment (EA) on August 13, 2004, requesting comments by September 13, 2004. In the EA, SEA recommended that a number of conditions be imposed on any decision granting abandonment authority.

SEA stated that the National Geodetic Survey (NGS) has advised that two geodetic station markers have been identified that may be affected by the proposed abandonment. Therefore, SEA recommended that BNSF be required to provide NGS with 90 days' notice prior to salvage activities to plan for their relocation.

SEA also stated that the Minnesota Department of Natural Resources, Natural Heritage and Nongame Research Program (MDNR), has indicated that the proposed abandonment may have an impact on the state threatened Blanding's turtle. To prevent any harm to the turtle population, MDNR submitted a list of recommendations that included distribution of an information sheet on Blanding's turtle to those working in the area. Therefore, SEA recommended that, prior to any salvage activities, BNSF be required to consult with Sarah Hoffmann at the MDNR (at 651-296-7863) to discuss the

measures recommended to protect this species of turtle. SEA also recommended that BNSF be required to have project personnel review the Blanding's turtle information sheet provided by the MDNR.

SEA further stated that the U. S. Environmental Protection Agency, Region 5 (EPA), has expressed concerns regarding the Blanding's turtle; removal and salvage methods to be used by BNSF during the proposed abandonment; the final disposition of crossties preserved with creosote; procedures for storing and fueling of construction equipment; procedures for the prevention and/or control of spills from construction equipment; and erosion mitigation practices to be utilized during abandonment activities. Therefore, SEA recommended that, prior to commencement of any salvage activities, BNSF be required to contact EPA, Region 5, regarding the Blanding's turtle; removal and salvage methods; final disposition of crossties preserved with creosote; procedures for storing and fueling of construction equipment; procedures for the prevention and/or control of spills from construction equipment; and erosion mitigation practices to be utilized during abandonment activities. SEA also recommended that BNSF be required to utilize existing public and private crossings when removing materials, particularly in wooded areas and areas adjacent to wetlands, and reseed disturbed areas with native flora.

In the EA, SEA also stated that EPA has recommended that BNSF contact the Regional Environment Assessment Ecologist, Wayne Barstad, to facilitate a review of the effects that this project would have on the state's endangered or threatened species or areas designated as critical habitat. Accordingly, SEA recommended that, prior to commencement of any salvage activities, BNSF be required to consult with the Regional Environmental Assessment Ecologist, Wayne Barstad, to facilitate a review of the effects that this project would have on state endangered or threatened species or areas designed as critical habitat.

SEA also stated that a portion of the right-of-way is adjacent to a former tie treating plant that is currently on both the state and Federal Superfund list. The Minnesota Pollution Control Agency (MPCA) has expressed concerns regarding the right-of-way because of that and because the right-of-way also is adjacent to a waste disposal facility. Therefore, SEA recommends that, prior to any salvage activities, BNSF be required to consult with the State Project Manager (Sue Johnson at 218-725-7762) to address the concerns of the MPCA and submit the results of these consultation efforts in writing to SEA.

No comments on the EA were received by the September 13, 2004 due date. Therefore, we will impose the conditions recommended by SEA. Accordingly, based on SEA's recommendation, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

SEA has indicated in its EA that the right-of-way may be appropriate for other public uses under 49 U.S.C. 10905. No one has sought a public use condition and none will be imposed.<sup>1</sup>

It is ordered:

1. Under 49 U.S.C. 10502, the Board exempts from the prior approval requirements of 49 U.S.C. 10903 the abandonment by BNSF of the above-described line, subject to the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that BNSF: (1) provide NGS with 90 days' notice prior to salvage activities to plan for the relocation of the two geodetic station markers on the line; (2) prior to any salvage activities, consult with Sarah Hoffmann at the MDNR (at 651-296-7863) to discuss the measures recommended to protect the state threatened Blanding's turtle; (3) have project personnel review the Blanding's turtle information sheet provided by the MDNR; (4) prior to commencement of any salvage activities, contact the EPA, Region 5, regarding the Blanding's turtle, removal and salvage methods, final disposition of crossties preserved with creosote, procedures for storing and fueling of construction equipment, procedures for the prevention and/or control of spills from construction equipment, and erosion mitigation practices to be utilized during abandonment activities; (5) utilize existing public and private crossings when removing materials, particularly in wooded areas and areas adjacent to wetlands, and reseed disturbed areas with native flora; (6) prior to beginning any salvage activities, contact the Regional Environmental Assessment Ecologist, Wayne Barstad, to facilitate a review of the effects of this project on state endangered or threatened species or areas designated as critical habitat; and (7) prior to beginning any salvage activities, consult with the State Project Manager (Sue Johnson at 218-725-7762) to address the concerns of the MPCA regarding the right-of-way that is adjacent to a waste disposal facility and to a former tie treating plant, and submit the results of these consultation efforts in writing to SEA.

2. BNSF is directed to serve a copy of this decision on Ferrellgas within 5 days of the service date of this decision and to certify to the Board that it has done so.

3. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by October 8, 2004, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,100. See 49 CFR 1002.2(f)(25).

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<sup>1</sup> Public use requests were due no later than 20 days after publication of the notice of the petition in the Federal Register, or by July 22, 2004.

4. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

5. Provided no OFA has been received, this exemption will be effective October 31, 2004. Petitions to stay must be filed by October 18, 2004, and petitions to reopen must be filed by October 26, 2004.

6. Pursuant to the provisions of 49 CFR 1152.29(e)(2), BNSF shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by BNSF's filing of a notice of consummation by October 1, 2005 and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams  
Secretary